

### REMARKS

Claims 1-3 and 5-10 are pending in the present application. No claims were canceled; claims 5 and 6 were amended; and no claims were added. Reconsideration of the claims is respectfully requested.

#### **I. Objection to Claims**

The examiner has stated that claims 5 and 6 were objected to because claims 5 and 6 are dependant on claim 4 which was cancelled by amendment. In response, the claims have been rewritten to depend from claim 1, thus overcoming this objection.

#### **II. 35 U.S.C. § 103, Obviousness**

The examiner has rejected claims 1-3 and 5-10 under 35 U.S.C. § 103(a) as being unpatentable over a variety of references. This rejection is respectfully traversed.

##### **A. Bettle, III et al. in view of Jones et al.**

Claims 1- 3 and 5 -10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bettle, III et al (USPN 4,977,004) in view of Jones et al. (USPN 6,063,414).

Bettle, III et al. discloses a food container (Column 1, lines 12- 14) for use with a variety of foods (Column 3, line 67 to Column 4, line 2) made with an inner layer of ethylene vinyl alcohol (Figure 2, #20 and Column 7, lines 30- 33) that is in contact with the food item (Column 2, lines 51- 54) with a thickness of 0.1 mm (Column 5, lines 29- 31). The container is sealed through heat sealing (Column 8, lines 8-9). However, Bettle, III et al. fails to disclose the dry food product acting as a desiccant to draw moisture away from the ethylene vinyl alcohol layer and the dry food product comprising a water activity of less than 0.6 or 0.4 upon the sealing step.

Jones et al. teaches dry pet food with a water activity 0.7 or less (Column 11, lines 16-17) that acts as a desiccant since water binds to the soluble fiber material (Column 5, lines 3- 6) in a polymer (Column 11, lines 7- 9) container of gas impermeable materials (Column 5, lines 1-2) for the purpose of packaging food that does not require preservatives or removal of oxygen to attain an increased shelf life, freshness and palatability of the dry food product.

It would have been obvious to one of ordinary skill in the art at the time the applicant's invention was made to have provided a dry food product with a water activity 0.7 or less to act as a desiccant in a container in Bettie, III et al. in order to package food that does not require preservatives or removal of oxygen to attain an increased shelf life, freshness and palatability of the dry food product as taught by Jones et al.

(Office Action, dated October 30, 2002, pp. 2-3).

Bettie teaches an EVOH film as an interior surface of the container. However, Bettie teaches placing juice and other liquids in the container. There is no attempt or suggestion of keeping the interior EVOH film free from contact with moisture, but, in fact, just the reverse is taught. However, in the present invention, as recited in claim 1 a dry food product acting as a desiccant is placed within the container in order to draw moisture away from the EVOH film. A proper *prima facie* case of obviousness cannot be established by combining the teachings of the prior art absent some teaching, incentive, or suggestion supporting the combination. *In re Napier*, 55 F.3d 610, 613, 34 U.S.P.Q.2d 1782, 1784 (Fed. Cir. 1995); *In re Bond*, 910 F.2d 831, 834, 15 U.S.P.Q.2d 1566, 1568 (Fed. Cir. 1990). Merely stating that the modification would have been obvious to one of ordinary skill without identifying an incentive or motivation for making the proposed modification is insufficient to establish a *prima facie* case. The mere fact that the prior art could be readily modified to arrive at the claimed invention does not render the claimed invention obvious; the prior art must suggest the desirability of such a modification. *In re Ochiai*, 71 F.3d 1565, 1570, 37 U.S.P.Q.2d 1127, 1131 (Fed. Cir. 1996); *In re Gordon*, 733 F.2d 900, 903, 221 U.S.P.Q. 1125, 1127 (Fed. Cir. 1984). However, in the present case, no one of ordinary skill in the art would be motivated to combine the teachings of Bettie with Jones since Bettie specifically contemplates having liquids and other water containing products in contact with the EVOH film surface, thus, there is no motivation to try and eliminate water from the surface of the EVOH film surface.

Furthermore, where the claims require that an element serve a specific purpose, the fact that a similar element was used for another purpose in the prior art or that the claimed element has a prior art attribute does not establish a *prima facie* case of obviousness. *In re Wright*, 848 F.2d 1216, 6 U.S.P.Q.2d 1959, (Fed. Cir. 1988). In the present case, although Jones teaches a dry pet food that may act as a desiccant, Jones does not teach that the desiccant draws water away from the EVOH film since Jones does not contemplate the use of an EVOH film.

In combining Bettel with Jones, the examiner has not pointed to any teaching in either reference suggesting such a modification, but rather has merely asserted that it would have been obvious. Such an assertion is insufficient to meet the examiner's burden of establishing a *prima facie* case of obviousness. *In re Fritch*, 972 F.2d 1260, 1262, 23 U.S.P.Q.2d 1780, 1783 (Fed. Cir. 1992). A *prima facie* case of obviousness is established when the teachings of the prior art itself suggest the claimed subject matter to a person of ordinary skill in the art. *In re Bell*, 991 F.2d 781, 783, 26 U.S.P.Q.2d 1529, 1531 (Fed. Cir. 1993). However, in the instant case, the examiner has merely found two disparate references containing between the two of them every element of the claimed invention. However, the inquiry is not whether each claimed element existed in the prior art, but whether the invention as a whole is obvious in light of the prior art.

Jones is motivated by a need to prevent microbial growth in and oxidation of pet food without resorting to vacuum packaging. (See Jones, col. 3, lines 5-25). However, Jones shows no concern and fails to recognize a problem with ethyl vinyl alcohol films when exposed to water. Bettel focuses on the problem of oxygen permeability of barrier films in low cost food packages. Neither of these references observes a problem with ethyl vinyl alcohol related to contact with water or a need to solve this problem. Therefore, there is not motivation to combine these two references. Thus, claim 1 is not rendered obvious by Bettel in view of Jones.

**B. Vadhar in view of Jones et al.**

Claims 1- 2 and 5- 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Vadhar (USPN 6,333,0151) in view of Jones et al. (USPN 6,063,414).

Vadhar discloses a multi-layer sealed (Column 6, lines 13- 21) article formed from four layers of film (Column 2, lines 43- 44), where in 85% of the film is formed from ethylene vinyl alcohol (Column 2, lines 62- 67) used to package dry pet food (Column 1, lines 14- 16). The film has a total thickness of 2 mm (Column 27, lines 14- 15), giving the ethylene vinyl alcohol a thickness of 0.5 mm. However, Vadhar fails to disclose the dry food product acting as a desiccant to draw moisture away from the ethylene vinyl alcohol layer and the dry food product comprising a water activity of less than 0.6 or 0.4 upon the sealing step.

Jones et al. teaches dry pet food with a water activity 0.7 or less (Column 11, lines 16-17) that acts as a desiccant since water binds to the soluble fiber material (Column 5, lines 3- 6) in a polymer (Column 11, lines 7- 9) container of gas impermeable materials (Column 5, lines 1-2) for the purpose of packaging food that does not require preservatives or removal of oxygen to attain an increased shelf life, freshness and palatability of the dry food product.

It would have been obvious to one of ordinary skill in the art at the time the applicant's invention was made to have provided a dry food product with a water activity 0.7 or less to act as a desiccant in a container in Vadhar in order to package food that does not require preservatives or removal of oxygen to attain an increased shelf life, freshness and palatability of the dry food product as taught by Jones et al. (Office Action, dated October 30, 2002, pp. 3-4).

Although Vadhar discloses using an EVOH film layer, there is no teaching or suggestion in Vadhar for using an EVOH film as an interior surface of the container as recited in claim 1 of the present application. Thus, even if Vadhar could be properly combined with Jones, the resulting method would not produce the invention as claimed in claim 1 of the present invention. Furthermore, Vadhar addresses the problem of packaging for pet food that requires less antioxidant than previous packaging or that provided no antioxidant to be mixed with the food product without the detrimental effects associated with the oxidation of the food product. (Vadhar, column 2, lines 5-8). Neither Vadhar nor Jones address the problem of protecting the EVOH layer from moisture while it is in contact with the product as does the present application. Therefore, there is simply no motivation for one of ordinary skill in the art to combine the teachings of Vadhar with Jones to achieve the present invention as recited in claim 1. Thus, claim 1 of the present application is not rendered obvious by Vadhar in view of Jones.

**C. Ramirez in view of Jones et al.**

Claims 1- 2 and 5- 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ramirez (USPN 6,214,392) in view of Jones et al. (USPN 6,063,414).

Ramirez discloses a package formed of films with an individual thickness of 0.25 mm or less (Column 6, lines 39- 42) that are sealed (Column 6, lines 47- 56) to form a package for dry food products (Column, 2, lines 32- 38). One of the films is a barrier layer made from ethylene vinyl alcohol (Column 7, lines 32- 41). However, Ramirez fails to disclose the dry food product acting as a desiccant to draw moisture away from the ethylene vinyl alcohol layer and the dry food product comprising a water activity of less than 0.6 or 0.4 upon the sealing step.

Jones et al. teaches dry pet food with a water activity 0.7 or less (Column 11, lines 16-17) that acts as a desiccant since water binds to the soluble fiber material (Column 5, lines 3- 6) in a polymer (Column 11, lines 7 -9) container of gas impermeable materials (Column 5, lines 1-2) for the purpose of packaging food that does not require preservatives or removal of oxygen to attain an increased shelf life, freshness and palatability of the dry food product.

It would have been obvious to one of ordinary skill in the art at the time the applicant's invention was made to have provided a dry food product with a water activity 0.7 or less to act as a desiccant in a container in Vadhar in order to package food that does not require preservatives or removal of oxygen to attain an increased shelf life, freshness and palatability of the dry food product as taught by Jones et al. (Office Action, dated October 30, 2002, pp.5).

Ramirez provides similar teachings to Vadhar. Furthermore, like Vadhar, Ramirez provides not teaching or suggestion for the EVOH layer to be an inner layer in contact with the food product. All limitations of the claimed invention must be considered when determining patentability. *In re Lowry*, 32 F.3d 1579, 1582, 32 U.S.P.Q.2d 1031, 1034 (Fed. Cir. 1994). Since providing a dry food product in contact with an interior surface of EVOH is not taught or suggested by Ramirez, the combination of Ramirez with Jones will not result in the claimed invention as recited in claim 1 of the present application. Thus, claim 1 is not rendered obvious by Ramirez in view of Jones.

**D. Claims 2-3, 5-10, and Obviousness Conclusion**

Claims 2-3 and 5-10 depend from claim 1 and contain all of the limitations of claim 1 as well as additional limitations. Therefore, the arguments supplied above in support of patentability for claim 1 apply equally for claims 2-3 and 5-10. Therefore, claims 2-3 and 5-10 are not rendered obvious by Bettel in view of Jones, by Vadhar in view of Jones, or by Ramirez in view of Jones.

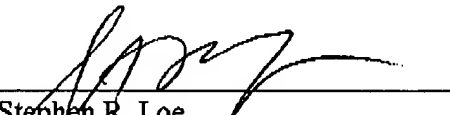
Therefore, the rejection of claims 1-3 and 5-10 under 35 U.S.C. § 103 has been overcome.

**III. Conclusion**

It is respectfully urged that the subject application is patentable over Bettel, Jones, Vadhar, and Ramirez and is now in condition for allowance.

The examiner is invited to call the undersigned at the below-listed telephone number if in the opinion of the examiner such a telephone conference would expedite or aid the prosecution and examination of this application. The Commissioner is hereby authorized to charge any additional payment that may be due or credit any overpayment to Deposit Account No. 50-0392.

Respectfully submitted,



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**APPENDIX**

**REDACTED CLAIMS:**

5. (Once Amended) The method of claim [4] 1 wherein the dry food product comprises a water activity of less than .6 upon the sealing of step c.
6. (Once Amended) The method of claim [4] 1 wherein the dry food product comprises a water activity of less than .4 upon the sealing of step c.